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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

3550 STEVENS CREEK ASSOCIATES,

Petitioner,

v.

BARCLAYS BANK OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a cause of action be stated under § 107(a)(2)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which creates private rights for recovery of hazardous substance cleanup costs, by the owner of a commercial building against the prior owner who placed the hazardous substance asbestos in the facility for insulation and fire protection purposes?

LIST OF PARTIES

3550 Stevens Creek Associates is a California limited partnership with its principal place of business in San Jose, California. The partnership was the plaintiff in this matter before the United States District Court for the Northern District of California and the appellant in the United States Court of Appeals for the Ninth Circuit.

Barclays Bank of California, a California banking corporation, was the defendant and appellee below. In 1988 Barclays Bank of California merged with Wells Fargo Bank, N.A.

In the Court of Appeals the United States, through the Department of Justice, submitted a brief as *Amicus Curiae* and participated in oral argument in support of 3550 Stevens Creek Associates.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

1. THE DECISION BELOW MANIFESTS SUCH AN EXTREME DEPARTURE FROM THIS COURT'S RULES OF STATUTORY INTERPRETATION AS TO WARRANT THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION 6

   A. THE MAJORITY'S INTERPRETATION OF "DISPOSAL" IN SECTION 107 OVERLOOKS THE PERVASIVE CERCLA STATUTORY REFERENCES TO "HAZARDOUS SUBSTANCE" AND IMPROPERLY RENDERS THEM SURPLUSAGE 7

   B. THE MAJORITY'S INTERPRETATION OF CERCLA SECTION 107 OVERLOOKS THE LANGUAGE AND PURPOSES OF SECTION 104(a)(3)-(a)(4) AND IMPROPERLY RENDERS THOSE PROVISIONS SURPLUSAGE 9

TABLE OF CONTENTS – Continued

Page

C. THE MAJORITY DISREGARDS ITS OBLIGATION TO ACCORD SUBSTANTIAL DEFERENCE TO LONG-STANDING EPA INTERPRETATIONS OF CERCLA AS IT APPLIES TO HAZARDOUS SUBSTANCES SUCH AS ASBESTOS 12

2. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUITS ON IMPORTANT QUESTIONS OF FEDERAL LAW UNDER CERCLA 13

A. THE MAJORITY'S RESTRICTION OF CERCLA TO HAZARDOUS WASTES IS CONTRARY TO THE UNDERSTANDING AND APPLICATION OF CERCLA IN OTHER CIRCUITS..... 13

B. THE MAJORITY'S REFUSAL TO APPLY CERCLA TO ASBESTOS IN BUILDINGS CONFLICTS IN PRINCIPLE WITH THE DECISION OF THE ELEVENTH CIRCUIT IN *UNITED STATES v. FLEET FACTORS*..... 15

CONCLUSION 18

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102 (1980) 7

Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988) 14

First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862 (4th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1113 (1990) 15

Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313 (11th Cir. 1990) 14

Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989) 6

Griffin v. Oceanic Contractors, Inc., 458 U.S. 565 (1982) 17

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 7, 11, 14

Pennsylvania Department of Public Welfare v. Davenport, ___ U.S. ___, 110 S.Ct. 2126 (1990) 8

Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989) 9, 11

Tanglewood East Homeowners v. Charles-Thomas Inc., 849 F.2d 1568 (5th Cir. 1988) 14

3550 Stevens Creek Associates v. Barclays Bank of California, 915 F.2d 1355 (9th Cir. 1990) ..... *passim*

United States v. Fleet Factors Corp., 901 F.2d 1550, *reh'g denied*, 911 F.2d 742 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 752 (1991) 13-17

Wilshire Westwood Associates v. Atlantic Richfield Corp., 881 F.2d 801 (9th Cir. 1989) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. §1254(1) 2

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601 *et seq*..... *passim*

Solid Waste Disposal Act, 42 U.S.C. §6903(3) 2, 8

OTHER AUTHORITIES

50 Fed. Reg. 37627 (1985)..... 12

Brief for the United States as *Amicus Curiae*.....5, 11

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PETITION FOR A WRIT OF CERTIORARI

Petitioner 3550 Stevens Creek Associates respectfully prays that a writ of certiorari issue to review the judgment and majority opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on October 3, 1990.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit are reported at 915 F.2d 1355 and are reprinted in the appendix hereto ("App.") at App. 1-31. The District Court's Order Granting Defendant's Motion for Judgment on the Pleadings (filed September 28, 1988) and the Judgment based

thereon (filed October 17, 1988) are unreported and are reprinted at App. 32-36.

JURISDICTION

Petitioner brought this action in the Northern District of California pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9607, 9613. On September 28, 1988 the District Court granted the defendant's Motion for Judgment on the Pleadings, and the court then entered Judgment dismissing the action on October 17, 1988.

The United States Court of Appeals for the Ninth Circuit rendered judgment against petitioner on October 3, 1990. App. 1. A majority of the panel denied Petitioner's request for a rehearing on November 29, 1990. App. 37.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, are the definitions in §§101(9), (14), and (29); the limitation on government authority, and the exception thereto, in 104(a)(3)(B) and (a)(4); and the private cost recovery rights in 107(a)(2)(B). 42 U.S.C. §§9601(9), (14), (29); 9604(a)(3)(B)-(a)(4); 9607(a)(2)(B). Also relevant is the definition in §1004(3) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. 42 U.S.C. §6903(3). These provisions are set forth in full in the majority opinion of the Ninth Circuit Court of Appeals reprinted in the appendix hereto at App. 1-25.

STATEMENT OF THE CASE

This is a civil action brought by 3550 Stevens Creek Associates ("Stevens Creek") to recover response costs which it has expended to clean up asbestos from an office building which was previously owned by Barclays Bank of California ("Barclays") and its predecessors-in-interest. Additionally, Stevens Creek seeks a declaratory judgment that Barclays is liable for necessary response costs which may yet be incurred by Stevens Creek with respect to the asbestos. This case was filed on October 9, 1987 in the United States District Court for the Northern District of California pursuant to §§107(a)(2)(B) and 113(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA").* 42 U.S.C. §§9607(a)(2)(B), 9613(b). The complaint and answer are reprinted in the appendix hereto at App. 38-52.

Barclays filed a motion for judgment on the pleadings or, in the alternative, for summary judgment. United States District Judge Robert P. Aguilar granted it as a motion for judgment on the pleadings. The Order Granting Defendant's Motion for Judgment on the Pleadings, and the attendant Judgment, are reprinted in the appendix hereto at App. 32-36.

The District Court accurately summarized the main factual allegations of the complaint as follows: "The subject building, located at 3550 Stevens Creek Boulevard, was constructed in 1963 by First Valley Corporation. The building contained asbestos insulation, as well as fire retardants. In 1969, Barclays Bank acquired First Valley's assets and First Valley Corporation was dissolved in 1971. Barclays then acquired title to the property, and sold said title to Plaintiff in 1984. From 1984 through 1986, Plaintiff remodeled the building, expending over $100,000 in

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* Unless otherwise indicated, all references to CERCLA herein are to the terms of that statute as amended by SARA.

removing asbestos from the building." App. 33. As required by CERCLA §107, the complaint alleged that the response costs Stevens Creek had incurred were necessary and consistent with the National Contingency Plan. App. 42.

Although the District Court opinion declared that there "can be no dispute that asbestos is a hazardous substance" covered by CERCLA, the court found that "no authority exists for the award of such relief" as Stevens Creek is seeking. App. 33, 35. The District Court opinion contains passing references to Barclays' argument that it "did not dispose of hazardous waste material at the site." App. 33-34. The opinion rests most heavily, however, upon the court's view of CERCLA §104(a)(3)(B), 42 U.S.C. §9604(a)(3)(B), which is a partial limitation on federal authority to respond to hazardous substances such as asbestos "within[] residential buildings or business or community structures." The court considered it "unlikely" that Congress would have intended to constrain federal government responses to asbestos in buildings, without similarly limiting private responses. The court also declared that "even assuming that Congress did intend precisely such a result, that intent is not clear and is not expressed in the statute." App. 34.

Stevens Creek filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. The United States, through the Department of Justice, filed a brief *amicus curiae* on behalf of Stevens Creek. The Court of Appeals heard argument on November 14, 1989 and, on October 3, 1990, a majority of the panel affirmed the judgment of the District Court. App. 1-25. A dissenting opinion was filed by Circuit Judge Harry Pregerson. App. 25-31. Stevens Creek's petition for rehearing was denied by a majority of the panel on November 29, 1990. App. 37.

In response to the District Court's reliance upon §104(a)(3)(B) as the ground of its decision, both Stevens Creek and the United States concentrated upon that provision before the Court of Appeals. The United States

rejected the District Court's view and declared, "A fundamental premise of CERCLA was that the massive problem posed by releases of hazardous substances into the environment could not be addressed unless the limited public funds devoted to the Superfund were supplemented with private cleanup efforts, supported by private cost recovery actions." Brief for the United States as *Amicus Curiae* ("U.S. Brief") at 7. The government also examined the §104(a)(4) emergency exception to the (a)(3)(B) limitation and stated that "Congress expected that private parties would respond to the releases covered by Subsection (a)(3), thus preserving the Fund for emergencies where no other party could respond." To bar such private actions would be "contrary to the obvious congressional desire to encourage private cleanups in order to preserve the Fund." *Id.* at 11.

The government also rejected "the faulty premise that CERCLA was only intended to deal with the problem of inactive and abandoned hazardous waste disposal sites." It documented the Environmental Protection Agency's "consistent agency interpretation" that CERCLA "extends beyond inactive hazardous waste sites." *Id.* at 15-16. The government urged remand to the District Court to determine whether Stevens Creek's case satisfies the numerous components of a CERCLA cause of action. *Id.* at 16-17.

The majority opinion seems to agree with Stevens Creek and the United States that "section 104(a)(3)(B) by its terms applies only to the President and not to private parties," although the majority also says it is unnecessary to decide the point. App. 20 n.18; App. 23-24 n.19. The majority construed the District Court opinion as determining that §107 itself does not extend to Stevens Creek's claim. App. 20 n.18. The majority concluded that the word "disposal" as used in §107 restricts private cost recovery actions only to situations involving hazardous "waste," rather than the broader category of hazardous "substances." Viewing the asbestos in this case as building material, rather than "waste," the majority concluded

that this cause of action could not stand under §107. App. 16-18, 21.

The dissenting opinion declaimed that the majority's "numbing, highly technical analysis" overlooks the "very language of the statute which refers repeatedly to the 'disposal of hazardous substances.'" App. 25, 27 n.5. Furthermore, Judge Pregerson urged the sound policy benefits under CERCLA of recognizing "an effective, statutory remedy for dealing with asbestos clean-up costs in private structures." App. 30. The dissent would let the case proceed on remand to the District Court for determination of whether Stevens Creek can prove the various, specific requirements of a §107 private cost recovery action which it has pleaded.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW MANIFESTS SUCH AN EXTREME DEPARTURE FROM THIS COURT'S RULES OF STATUTORY INTERPRETATION AS TO WARRANT THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Justice Scalia noted not long ago that a brief submitted to the Court had treated statutory language as secondary to legislative history. He lamented that a legal culture may be developing in which such an assertion by counsel "was not beyond the pale." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 530 (1989) (Scalia, J., concurring). A similar corruption of the role of statutory language would have been no more beyond the pale had counsel addressed one of the CERCLA provisions at issue here as follows:

> In any event we believe it is unnecessary . . . to decide whether section 104(a)(3)(B) is a limitation on private parties as well as the government. We simply consider it along with *all other relevant legislative history*.

This astonishing statement, however, was not made by counsel in this case. It was made in the majority opinion. App. 24 n.19 (emphasis added).

The majority's statement reduces major language of the statute to the subordinate, explanatory role of legislative history. The statement is but one of many aspects of the majority opinion which reflect an egregious disregard of the proper role of the judiciary in the interpretation of Congressional statutes. What might not be beyond the pale when uttered by counsel surely must become so when uttered by a panel majority in a United States Court of Appeals, subject to the supervisory power of this Court.

A. THE MAJORITY'S INTERPRETATION OF "DISPOSAL" IN §107 OVERLOOKS THE PERVASIVE CERCLA STATUTORY REFERENCES TO "HAZARDOUS SUBSTANCE" AND IMPROPERLY RENDERS THEM SURPLUSAGE.

This Court has repeatedly affirmed "the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980). This canon and admonition were not respected in the decision below.

The majority opinion overlooks a "cascade of plain language" in CERCLA. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, ___, 109 S.Ct. 2273, 2279 (1989). CERCLA repeatedly declares that it applies to "hazardous substances." *See, e.g.*, 42 U.S.C. §§9604-9607 *passim*. The majority would limit the application of CERCLA rights and remedies to the narrower category of "hazardous wastes" addressed in the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. §§6901 *et seq*. Because CERCLA §101(29) incorporates by reference the SWDA definition of "disposal," the majority construes the term to apply even in CERCLA only to the placement of "hazardous wastes." As the dissenting judge says, "This proposition fails to take into account the very language of the statute which refers

repeatedly to the 'disposal of hazardous substances.' " App. 27 n.5.

By overlooking this statutory language, the majority renders it surplusage. If "hazardous substance" in §107 only means "hazardous waste," there is no reason for Congress to have included the former phrase at all. Similarly, the definition of "hazardous substance" in §101(14), which identifies "hazardous waste" as a subset of the broader field of "hazardous substances," becomes virtually meaningless.

This Court's cases "express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Department of Public Welfare v. Davenport*, ___ U.S. ___, 110 S.Ct. 2126, 2133 (1990). An interpretation which gives meaning to the "whole act" is not only available here, but is compelled by the logic and purposes of the statute: CERCLA adopts a definition of "disposal" borrowed from the solid waste statute *not* so as to nullify CERCLA's own references to "hazardous substances," but simply to identify the broad range of physical activities which constitute "disposal" of the broad category of "hazardous substances" CERCLA itself addresses. Such activities include the "discharge, deposit, injection, . . . or placing" of hazardous substances. 42 U.S.C. §6903(3).

Even apart from these elements of the borrowed SWDA definition of disposal activities, CERCLA contains other explicit indications of the kinds of activities that are covered. Thus the definition of "facility" in §101(9) refers to any site where "a hazardous substance has been deposited, stored, disposed of, or placed . . . " 42 U.S.C. §9601(9). Similarly, §101(35)(A) addresses "the disposal or placement of the hazardous substance on, in, or at the facility." 42 U.S.C. §9601(35)(A). By construing the word "disposal" to apply only to discarded, waste materials, the majority renders as surplusage the statute's repeated

references to the broad universe of Congress's concern – hazardous substances.[1]

Ignoring plain and pervasive statutory language, and relying on inapt precedent, the majority wrongly concludes that "disposal of any hazardous substance" in CERCLA §107 only applies to disposal of "wastes" as defined by the SWDA. The majority thus indulges in "the unhealthy process of amending the statute by judicial interpretation." *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, ___, 109 S.Ct. 2558, 2574 (1989) (Kennedy, J., concurring).

B. THE MAJORITY'S INTERPRETATION OF CERCLA §107 OVERLOOKS THE LANGUAGE AND PURPOSES OF §104(a)(3)-(a)(4) AND IMPROPERLY RENDERS THOSE PROVISIONS SURPLUSAGE.

The majority's interpretation of "disposal" overlooks the language and purposes of §104(a)(3)(B)-(a)(4). If the majority view were correct, and §107 were wholly inapplicable to asbestos-containing materials used in buildings, §104(a)(3)(B)-(a)(4) also would be meaningless. If asbestos in buildings is simply beyond the scope of this law, and no cost recovery actions pertaining to it can be brought by anyone under §107, there would have been

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[1] While attempting to buttress its reading of "disposal" through tangential case law, the majority overlooks major differences between this §107(a)(2) case, against a person who owned the facility at the time the hazardous substance was placed there, and the 107(a)(3) "disguised products liability" cases brought against manufacturers and sellers of hazardous products which someone else later placed at the contaminated facility. App. 18 n.16. As petitioner will explain in its brief if the writ is granted, the meaning of "disposal" is not the issue in the (a)(3) cases.

no need for Congress to say anything more on the subject.[2]

Indeed the majority asserts that "Section 107 could have, but did not, explicitly provide for the problem of the release of asbestos fibers from materials that are part of the structure of a building." App. 19. The majority concludes that the absence of such a provision in §107 amounts to the absence of such a provision in the entire statute. This overlooks both the broad, inclusive terms of §107 itself and also §104(a)(3)(B)-(a)(4) in which Congress through SARA did so "provide." As the United States forcefully urged below, "Clearly, the statute authorizes EPA to respond to releases or threatened releases of asbestos from buildings in an emergency." U.S. Brief at 11.

If the majority were correct, Congress would have had no need to address – as it plainly did – the circumstances in which the federal government may act and expend public funds to clean up releases or threatened releases "from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures." Under the majority's view, Congress addressed in §104 cleanup powers which under §107 do not exist.[3]

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[2] The majority suggests that CERCLA does not apply to the escape of asbestos fibers within buildings. App. 11 n.9. This flies in the face of §104(a)(3)(B)'s reference to "exposure within" buildings. The majority also assumes that any hazard resulting from friable asbestos in this case solely "is within the building." App. 16. This assumption is speculative, given that petitioner has had no opportunity to present proof of facts which could support the allegations of the complaint.

[3] Any suggestion that these provisions of §104 are wholly independent of §107 would lead to the illogical conclusion that, in contrast with all other government cleanup activities under CERCLA, on the single subject of asbestos in buildings, Congress authorized the government to spend public funds for

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Similarly, under the majority's reading there would have been no need for Congress to refer in §104(a)(4) to any "other person with the authority and capability to respond." That reference on its face encompasses a private party who undertakes a cleanup of asbestos in such a structure and who then has cost recovery rights under §107. This understanding of §104 gives full, logical significance to all the words Congress has used.[4] As this Court recognized in the *Union Gas* case, 491 U.S. at ___, 109 S.Ct. at 2285, private cleanups and cost recovery remedies are an integral part of the CERCLA scheme because of the limits on available resources of the federal Superfund. As the United States pointed out below, "Congress expected that private parties would respond to the releases covered by Subsection (a)(3), thus preserving the Fund for emergencies" and promoting "the obvious congressional desire to encourage private cleanups. . . . " U.S. Brief at 11.

"Reluctance to working with the basic meaning of words in a normal manner undermines the legal process." *Public Citizen v. U.S. Department of Justice*, 491 U.S. at ___, 109 S.Ct. at 2574 (Kennedy, J., concurring). The majority's attempt to make 104(a)(3)-(4) disappear, or somehow recede into the background with "other relevant legislative history," should be seen for what it is. It is an

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cleanups under 104 but *without* any cost recovery recourse against responsible parties under 107. It is difficult to imagine such a deviant legislative choice, and there is no basis for inferring it.

[4] It might be suggested that the statutory language should be disregarded in this case because a literal reading would "compel an odd result." *See Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, ___, 109 S.Ct. 2558, 2566 (1989). Such a suggestion would disregard not only the limited domain of the "odd" or "absurd" result cases as this Court has viewed them, but also the sound policy and logic supporting the analyses of the dissenting opinion and the United States as *amicus* below.

extreme departure from the accepted and usual course of judicial proceedings involving statutes enacted by the United States Congress, and it should not be tolerated by this Court.

C. THE MAJORITY DISREGARDS ITS OBLIGATION TO ACCORD SUBSTANTIAL DEFERENCE TO LONG-STANDING EPA INTERPRETATIONS OF CERCLA AS IT APPLIES TO HAZARDOUS SUBSTANCES SUCH AS ASBESTOS.

The majority briefly acknowledges this Court's admonition that "[t]he interpretation of an agency charged with the administration of a statute is entitled to substantial deference. . . . " App. 23 n.19. The majority then charts a separate course, declaring that "we feel no such obligation in this case." *Id.* The majority dismisses the "litigation arguments of the United States" as not constituting an "agency interpretation." Whether or not this casting aside of *amicus* views is proper, there is other evidence of applicable CERCLA interpretations by the EPA, the federal agency which enforces CERCLA. The Ninth Circuit in other cases has recognized that "considerable deference" should be accorded EPA's interpretations of CERCLA. *See, e.g., Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 881 F.2d 801, 810 (9th Cir. 1989). Here the majority wrongly chose not to consider pertinent EPA views and actions.

First, both Stevens Creek and the United States had called to the attention of the Court of Appeals the EPA's unwavering view that "CERCLA does not limit response to hazardous waste sites." *See, e.g.*, 50 Fed. Reg. 37627, 37631-32 (Sept. 16, 1985). This comment was made regarding an EPA proposal to place a residential structure with high levels of radiation on the National Priorities List for EPA action under CERCLA. In response it had been argued that CERCLA was intended only for hazardous waste sites, not residential structures. The EPA disagreed and placed the residence on the List. The decision

below wholly ignores this agency interpretation as the majority seeks to restrict CERCLA to "inactive and abandoned hazardous waste disposal sites." App. 19.

Second, the majority opinion overlooks the directly pertinent EPA interpretation in *United States v. Fleet Factors*, 901 F.2d 1550, 1553, *reh'g denied*, 911 F.2d 742 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 752 (1991). There the EPA, acting under CERCLA, incurred costs in 1984 of nearly $400,000 in cleaning up hazardous substances at a facility in Georgia. Included were "forty-four truckloads of material containing asbestos" that formerly had been on pipes connected to equipment or machinery at the facility. 724 F.Supp. 955, 959 (S.D.Ga. 1988). EPA, in short, cleaned up asbestos from inside a building and spent Superfund money to do so.

Although EPA's action in *Fleet Factors* is not a written administrative interpretation, at least as much, if not more, attention should be paid to what EPA did there, especially since neither a litigant nor the Eleventh Circuit questioned it. In a court of law, as well as elsewhere in American life, actions speak louder than words, especially when the government has put money where its mouth might have been. The majority has given *Fleet Factors* only a cursory citation and has completely overlooked this strong, albeit implicit, agency interpretation that CERCLA applies to the cleanup of asbestos installed inside a building. App. 9 n.6.

2. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF OTHER CIRCUITS ON IMPORTANT QUESTIONS OF FEDERAL LAW UNDER CERCLA.

A. THE MAJORITY'S RESTRICTION OF CERCLA TO HAZARDOUS WASTES IS CONTRARY TO THE UNDERSTANDING AND APPLICATION OF CERCLA IN OTHER CIRCUITS.

The majority quotes approvingly from an official study under CERCLA to the effect that "hazardous

substances are *generally* dealt with at the point when they are about to, or have become, wastes." App. 17 (emphasis added). Obviously the major thrust of CERCLA, and of most of the cases decided under it, is the problems associated with hazardous waste sites. The fact that this is "generally" what CERCLA treats, however, does not mean it is exclusively what CERCLA covers.

In seeking to transform the mainstream of CERCLA coverage into the totality of it, the majority departs from case law in other Circuits which explicitly recognizes that CERCLA applies broadly to "hazardous substances."[5] Although many courts, including even this Court, have tended to use "hazardous substances" and "hazardous wastes" interchangeably,[6] some Circuits' decisions clearly indicate that "hazardous substances" cover more than discarded, waste materials.

For example, the Eleventh Circuit in *Fleet Factors* applied CERCLA not just to the EPA's removal of asbestos but also to its removal of hundreds of large drums of dyes and chemicals used for textile printing purposes. 901 F.2d 1550 (11th Cir. 1990). *See also Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990) (electrical transformers containing PCBs). Similarly, the Seventh Circuit in *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988), considered cleanup liabilities arising from releases of useful, wood preservative chemicals. The Fifth Circuit applied CERCLA to a residential subdivision in *Tanglewood East*

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[5] In further briefing if the writ is granted, petitioner will show that the legislative history is fully supportive of the broad scope of CERCLA's application to hazardous substances. Petitioner will also show that the majority misconstrues the portions of the SARA legislative history upon which it relies.

[6] In *Pennsylvania v. Union Gas Company*, 491 U.S. at ___, 109 S.Ct. at 2285, the Court notes that "Congress had tried to solve the problem posed by hazardous substances," yet in the same paragraph the Court refers broadly to "hazardous-waste contamination."

Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988). Even the Fourth Circuit, although wrongly rejecting CERCLA's application to asbestos in buildings, aptly stated:

> We also recognize that the statute reaches far more than hazardous waste sites; in fact, it has been said that through CERCLA, 'Congress sought to deal with every conceivable area where hazardous substances come to be located. . . .' *State of N.Y. v. General Elec. Co.*, 592 F.Supp. 291, 296 (N.D. N.Y. 1984).

First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 867 (4th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1113 (1990).

On the question of whether CERCLA covers only hazardous waste sites, as the Ninth Circuit now says, or a broader category of facilities containing hazardous substances, as these other Circuits say, there is now conflict. Unless this Court resolves the conflict, both governmental and private cleanup efforts will face serious obstacles. When CERCLA cleanup or cost recovery is attempted in cases like those just noted, a potentially responsible party can interpose the Ninth Circuit's view that the cleanup is not authorized by the statute because the materials in question, however hazardous they may be, are not "wastes" but rather useful building materials or process chemicals. In order to avoid the confusion that EPA, state governments, and private parties will face amidst this conflict among the Circuits, and in order to promote the uniform and salutary cleanup policies CERCLA embodies, this Court should resolve the conflict.

B. THE MAJORITY'S REFUSAL TO APPLY CERCLA TO ASBESTOS IN BUILDINGS CONFLICTS IN PRINCIPLE WITH THE DECISION OF THE ELEVENTH CIRCUIT IN *UNITED STATES v. FLEET FACTORS*.

As noted, the EPA in *Fleet Factors* had cleaned up hazardous substances in a building, including large amounts of asbestos-containing materials which had been

on pipes connected to machinery and equipment inside the building. No dispute was raised in *Fleet Factors* as to whether asbestos in buildings is covered by CERCLA. Instead the case proceeds on the implicit assumption that CERCLA cleanup liability extends to that substance in that type of facility.

The Eleventh Circuit's opinion also explicitly comments upon liability for asbestos cleanup under §107(a)(2), the same provision presented here. In discussing liability of the secured lender, the Eleventh Circuit said, "Indeed, Fleet's involvement would pass the threshold for operator liability under §9607(a)(2)." 901 F.2d at 1560. The court's footnote at that point is striking: It quotes an exchange between Judge Kravitch, the decision's author, and counsel for Fleet Factors during oral argument in which "counsel for Fleet virtually conceded operator liability for its conduct with respect to the facility when he discussed Fleet's potential for liability were it to have fixed a hole in the roof" of the building and found "in fixing the roof that there is some asbestos that is being dislodged." *Id.* at 1560 n.15. The clear import of the quoted exchange is that CERCLA liability would attach under §107(a)(2) "as to that asbestos." *Id.*

This exchange, and the appurtenant statement in the text that Fleet could be liable under §107(a)(2), embody an opinion of the Eleventh Circuit that conflicts in principle with the conclusion of the majority opinion in the instant case. This conflict should be resolved by this Court as it affects an important question of federal law.

Asbestos in commercial buildings poses a widespread hazard. As part of the national effort to address it, owners such as Stevens Creek should be permitted to pursue the rights Congress has granted them. Asbestos contamination will not go away if causes of action such as this are disallowed, but the incentives CERCLA provides for prompt cleanup would be reduced. Furthermore, unlike the myriad of other hazardous substance problems in which CERCLA promotes fair sharing of cleanup costs among present and past responsible parties, current

property owners alone would bear the full cleanup burden.

It may well be that very few CERCLA cases such as this are likely to arise. Current building owners who purchased at lower prices because of known asbestos contamination would have little or no reason to pursue this remedy against prior owners. Even the defendant's answer in this case recognizes that the ultimate result here would be an equitable allocation of cleanup liabilities under §§107 and 113(f). App. 51-52. If, however, there prove to be many similar suits which could be brought if this cause of action stands, this Court's reminder regarding statutory claims is apt: "The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 565, 576 (1982).

As the United States noted below, to discourage private asbestos cleanup efforts is ultimately to make it "more likely that Superfund monies would have to be spent under §104(a)(4)'s emergency exception." U.S. Brief at 11. That outcome is directly contrary to the strong Congressional policy favoring private action in the first instance. By resolving the conflict in principle among the Circuits and permitting Stevens Creek's cause of action to proceed, the Court can promote this Congressional policy as well as the broad environmental health and safety objectives of CERCLA.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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February 1991

3550 STEVENS CREEK ASSOCIATES, a Limited Partnership, Plaintiff-Appellant,

v.

BARCLAYS BANK OF CALIFORNIA, Defendant-Appellee.

No. 88-15503.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 14, 1989.

Decided Oct. 3, 1990.

Bernard S. Greenfield and Marcia E. Gerston, Levy, Greenfield & Davidoff, San Jose, Cal., Kenneth A. Manaster, Los Altos, Cal., for plaintiff-appellant.

Timothy M. Flaherty, Jordan, Keeler & Seligman, San Francisco, Cal., for defendant-appellee.

Donald A. Carr, Anne S. Almy and David C. Shilton, U.S. Dept. of Justice, Washington, D.C., for amicus.

Appeal from the United States District Court for the Northern District of California.

Before FARRIS, PREGERSON and RYMER, Circuit Judges.

RYMER, Circuit Judge:

3550 Stevens Creek Associates appeals the entry of judgment on the pleadings in its action for recovery of costs incurred in the voluntary removal of asbestos during remodeling of a commercial building against Barclays Bank of California, a predecessor-in-interest who owned the building at the time materials containing asbestos

were installed. The United States as Amicus Curiae has filed a brief on behalf of Stevens Creek. The question on appeal is whether a private party may recover its response costs for clean-up of asbestos installed in a commercial building under section 107(a)(2)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607 (CERCLA). We hold that CERCLA does not permit such an action, and affirm.

I

In 1963, First Valley Corporation constructed a building, located at 3550 Stevens Creek Boulevard in San Jose, California, which contained asbestos insulation and fire retardants. In 1969, Barclays Bank acquired First Valley's assets. First Valley Corporation was dissolved in 1971, when Barclays acquired title to the property. Barclays sold the property to Stevens Creek in 1984. From 1984 through 1986, Stevens Creek remodeled the building, spending more than $100,000.00 in removing asbestos.

Stevens Creek brought this suit in district court under CERCLA, 42 U.S.C. §§ 9601-9657. It sought damages under section 107(a), 42 U.S.C. § 9607(a) for removal costs incurred. On Barclay's motion the district court granted judgment on the pleadings, holding that no authority exists for the award of such relief.

II

A judgment on the pleadings is a decision on the merits which we review de novo. *General Conference Corp.*

of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1134, 107 L.Ed.2d 1039 (1990); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir.1988). Judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 12(c). The district court's interpretation of CERCLA is also reviewed de novo. *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 395 (9th Cir.1989). We may affirm the district court's decision on any ground supported by the record. *Marino v. Vasquez*, 812 F.2d 499, 508 (9th Cir.1987); *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir.), *cert. denied*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 555 (1985).

III

CERCLA was enacted to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." Pub.L. No. 96-510, 94 Stat. 2767 (1980). It generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed. 42 U.S.C. § 9607(a); *Hanna*, 882 F.2d at 394. To promote these objectives, Congress created a private claim for certain "response costs" against "various types of persons who contributed to the dumping of hazardous waste at a site." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152 (9th Cir.1989) (citations omitted).

CERCLA employs a bifurcated mechanism to promote the cleanup of hazardous waste sites, hazardous

spills, and releases of hazardous substances into the environment. Through the creation of Superfund, the federal government is empowered to respond to hazardous waste disposal. 42 U.S.C. §§ 9604-05, 9611-12. The statute also authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation. 42 U.S.C. § 9607(a)(1-4). *See Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890-92 (9th Cir.1986); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir.1986); *Walls v. Waste Resource Corp.*, 823 F.2d 977, 980-81 (6th Cir.1987); *Prudential Ins. Co. of America v. United States Gypsum*, 711 F.Supp. 1244, 1251 (D.N.J.1989); *United States v. Reilly Tar and Chem. Corp.*, 546 F.Supp. 1100, 1112 (D.Minn.1982); H.R. Rep. No. 1016 at 22, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6119, 6125.

A private party may recover its "response costs"[1] for cleanup of hazardous wastes from a liable party under

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[1] Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), provides:

> (25) The terms 'respond' or 'response' means [sic] remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto.

"Remove" and "removal" are defined at Section 101(23) of CERCLA, 42 U.S.C. § 9601(23):

> (23) The terms 'remove' or 'removal' means [sic] the cleanup or removal of released hazardous

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Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). Section 107(a) provides:

> (a) Notwithstanding any other provision of rule of law, and subject only to the defenses set forth in subsection (b) of this section –
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel

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substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 104(b) of this Act, and any emergency assistance which may be provided under the Disaster Relief Act of 1974.

owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which cause the incurrence of response costs, of hazardous substance, shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i).

There is no question that section 107(a)(2)(B) "expressly creates a private cause of action." *Wickland Oil Terminals*, 792 F.2d at 890. *Accord Walls*, 823 F.2d at 980-81. To prevail in a private cost recovery action, a plaintiff must establish that (1) the site on which the hazardous substances are contained is a "facility" under CERCLA's definition of that term, Section 101(9), 42 U.S.C. § 9601(9);[2] (2) a "release" or "threatened release" of any

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[2] Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), provides:

(9) The term 'facility' means (A) any building, structure, installation, equipment, pipe or pipeline

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"hazardous substance" from the facility has occurred, 42 U.S.C. § 9607(a)(4); (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan," 42 U.S.C. §§ 9607(a)(4) and (a)(4)(B); and (4) the defendant is within one of four classes of persons subject to the liability provisions of Section 107(a). *Ascon Properties*, 866 F.2d at 1152.

Stevens Creek argues that it has sufficiently pleaded all the allegations necessary for a claim under section 107, and that its cause of action is properly brought under the actual language of that section. In its view section 107 is not subject to any relevant limitations, particularly to a limitation on governmental responses to release from products which are part of the structure of a building set out in section 104(a)(3). Barclays contends that its predecessors-in-interest did not "dispose" of a hazardous substance within the meaning of section 107, and that the response limitations in section 104 are persuasive authority that removal of building materials containing asbestos is outside the scope of CERCLA.[3]

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(including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

[3] Barclays also contends that it is not an "owner or operator" of the property, arguing that its acquisition of the Stevens

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We agree with Stevens Creek that the limitation on governmental response in section 104 is not dispositive. At the same time, there is no authority recognizing a private right to relief for the voluntary removal of asbestos from a commercial building. The cases upon which Stevens Creek and the EPA rely concern the disposal or dumping of hazardous substances as waste, and not the removal of asbestos or any other building material from a commercial building.[4] Even those cases which do involve asbestos relate to its disposal as waste rather than its use as a building material,[5] and no federal court

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Creek property resulted from a purchase of assets which does not result in successor liability under CERCLA. *See Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir.1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 837, 102 L.Ed.2d 969 (1989). Because this is a factual question and is irrelevant to our disposition of this appeal, we do not consider it.

[4] *See, e.g., Walls*, 823 F.2d 977 (removal of waste dumping ground); *Dedham*, 805 F.2d at 1075 (removal of "high concentrations of volatile organic compounds" illegally discharged into wells); *Wickland Oil Terminals*, 792 F.2d at 889 (removal of "hazardous concentrations of various metals" deposited in ground on site of former smelting operation); *New York v. Shore Realty*, 759 F.2d 1032, 1037 (2d Cir.1985) (removal of "hazardous waste disposal site"); *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F.Supp. 283, 285 (N.D.Cal.1984) (discharge of hazardous substances into pond by steel company); *New York v. General Elec. Co.*, 592 F.Supp. 291, 293 (N.D.N.Y.1984) (disposal of "used transformer oil" containing PCBs); *Reilly Tar & Chem.*, 546 F.Supp. at 1105 (D.Minn.1982) (chemical waste contamination of groundwater by refinery).

[5] *See Smith Land*, 851 F.2d at 87-88 ("Clean-up of a hazardous waste site" consisting of "large waste pile" accumulated

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which has considered the placement of asbestos as part of the structure of a building has concluded that it falls within the scope of Section 107(a).[6]

A

We therefore begin by considering the plain language of the statute. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982). To be liable under Section 107(a)(2)(B), there must have been a "release" or "threatened release" of a hazardous substance, and the defendant must be a person "who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2) and (4).

"Release" is defined in section 101(22) as "any spilling, leaking, pumping, pouring, emitting, emptying,

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"in the course of manufacturing asbestos products"); *United States v. Metate Asbestos Corp.*, 584 F.Supp. 1143, 1145 (D.Ariz.1984) (removal of "asbestos mine and mill wastes").

[6] *See First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 867-69 (4th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1113, 107 L.Ed.2d 1020 (1990); *Retirement Community Developers, Inc. v. Merine*, 713 F.Supp. 153, 156-58 (D.Md.1989); *Prudential*, 711 F.Supp. at 1253-56; *Corporation of Mercer Univ. v. National Gypsum Co.*, No. 85-126-3-MAC (N.D.Ga. March 9, 1986), 24 Env't Rep. Cas. (BNA) 1953. *Cf. United States v. Fleet Factors Corp.*, 724 F.Supp. 955 (S.D.Ga.1988) (denying defendants' motion for summary judgment in action by Environmental Protection Agency to recover response costs for removal of asbestos-containing material and barrels of hazardous chemicals), *aff'd*, 901 F.2d 1550 (11th Cir.1990).

discharging, injecting, escaping, leaching, dumping, or disposing into the environment. . . . "[7] The "environment" includes surface and ground waters and "ambient air within the United States."[8] Other courts considering

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[7] Section 101(22) of CERCLA, 42 U.S.C. 9601(22), provides in full:

> (22) The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act, or, for the purposes of section 104 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 102(a)(1) or 302(a) of the Uranium Mill Tailings Radiation Control Act of 1978, and (D) the normal application of fertilizer.

[8] Section 101(8) of CERCLA, 42 U.S.C. 9601(8), provides in full:

> (8) The term 'environment' means (A) the navigable waters, the waters of the contiguous zone, and the

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this language have concluded that the "environment" referred to in the statute "includes the atmosphere, external to the building," but not the air within a building. *See Prudential*, 711 F.Supp. at 1255 n. 3 (citing *First United Methodist Church*, 882 F.2d at 867 & n. 5); *Knox v. AC & S, Inc.*, 690 F.Supp. 752, 757 (S.D.Ind.1988); *Electric Power Bd. of Chattanooga v. Westinghouse Elec. Corp.*, 716 F.Supp. 1069, 1080-81 (E.D.Tenn.1988). *See also Covalt v. Carey Canada Inc.*, 860 F.2d 1434 (7th Cir.1988); *United States v. A & F Materials Co.*, 582 F.Supp. 842, 845 (S.D.Ill.1984).[9]

"Facility" is a "building [or] structure . . . where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). Barclays does not contend that a structure built with asbestos insulation and fire retardants is not a "facility" within the meaning of CERCLA.[10]

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> ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

[9] Although not contested in this proceeding, courts which have addressed this language have determined that the escape of asbestos fibers within a building falls outside the intended objectives of CERCLA. *See First United Methodist Church*, 882 F.2d at 867 & n. 5; *Prudential*, 711 F.Supp. at 1255 n. 3.

[10] In a sense it is more accurate to say that asbestos insulation and fire retardants *are* the building, than to suppose they

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"Hazardous substance" is defined in section 101(14), 42 U.S.C. § 9601(14).[11] That section, in turn, refers to both

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have have [sic] "come to be located" *in* the building. However, the term "facility" has been broadly construed by the courts, such that "in order to show that an area is a 'facility,' the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there." *Metate Asbestos*, 584 F.Supp. at 1148; *see also Shore Realty*, 759 F.2d at 1043 n. 15; *Knox*, 690 F.Supp. at 756; *United States v. Bliss*, 667 F.Supp. 1298, 1305 (E.D.Mo.1987); *General Elec. Co.*, 592 F.Supp. at 295.

[11] Section 9601(14), 42 U.S.C. § 9601(14), defines "hazardous substance":

> (14) The term 'hazardous substance' means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of this Act, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act. The term does not include petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under sub-paragraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

the Clean Water Act, 33 U.S.C. § 1317, and the Clean Air Act, 42 U.S.C. § 7412. Asbestos is classified as a "toxic pollutant" under the Clean Water Act and a "hazardous air pollutant" under the Clean Air Act. 33 U.S.C. § 1317; 42 U.S.C. § 7412; *see* 40 C.F.R. Part 122, App. D, Table V (1987); 40 C.F.R. § 401.15 (1987); 40 C.F.R. Part 61, Subpart M (1987). It is also designated as a hazardous substance for purposes of sections 102 (authorizing Administrator to designate hazardous substances) and 105 (providing for the national contingency plan) of CERCLA. *See* 40 C.F.R. § 302.4, Table 302.4 (1987).[12] The district court found, and we assume, that asbestos is a "hazardous substance"; however that fact is insufficient to establish that its placement as part of the structure of a building constitutes "disposal of any hazardous substance" under CERCLA.

"Disposal" is defined by reference to the Solid Waste Disposal Act.[13] SWDA section 1004 defines "disposal" as:

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[12] *See also Prudential Ins. Co.*, 711 F.Supp. at 1252; *Knox*, 690 F.Supp. at 755; *Metate Asbestos*, 584 F.Supp. at 1146-48. The statutes and regulations make no distinction between these waste forms of asbestos and asbestos in solid form employed as a building material.

[13] Section 101(29) of CERCLA, 42 U.S.C. § 9601(29), provides:

> (29) The terms 'disposal', 'hazardous waste', and 'treatment' shall have the meaning provided in section 1004 of the Solid Waste Disposal Act.

Section 1004 of the Solid Waste Disposal Act, 42 U.S.C. § 6903, provides, in pertinent part:

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the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or

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(3) The term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

. . . .

(5) The term 'hazardous waste' means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may –

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treat, stored, transported, or disposed of, or otherwise managed.

* * *

(27) The term 'solid waste' means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under

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> hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

"Solid waste" is "any garbage, refuse, sludge, . . . and other discarded material. . . . " 42 U.S.C. § 6903(27), and "hazardous waste" is that subset of "solid waste" which poses a particularly great threat to human health or the environment, *see* 42 U.S.C. § 6903(5). Regulations issued by the Environmental Protection Agency similarly define "solid waste" as "any discarded material" which is "abandoned, . . . recycled, . . . or inherently wastelike." 40 C.F.R. § 261.2(a). The terms do not include materials which are "used or reused as ingredients in an industrial process to make a product. . . . " 40 C.F.R. § 261.2(e)(1)(i).

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> section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923 [42 U.S.C. § 2011 et seq.]).
>
> . . . .
>
> (34) The term 'treatment', when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

On its face "disposal" pertains to "solid waste or hazardous waste," not to building materials which are neither. There is no suggestion that Barclays or its predecessors-in-interest discarded asbestos insulation and fire retardants; rather they were used to construct the building. Nor can the construction of a building using these materials fit into "the discharge, deposit, injection, . . . or placing into or on any land or water" specified in the definition. There is no question that the asbestos materials in this case were built into the structure, not placed "into or on any land or water." Finally, there is no indication that materials containing asbestos installed as part of the structure of a building, as here, are such that asbestos fibers "may enter the environment or be emitted into the air." Even when action is taken that makes the asbestos friable, the resulting hazard is within the building.

Stevens Creek argues that the specific reference to "disposal of *hazardous substances*" in section 107 overrides the definition of "disposal" limited to "hazardous wastes" borrowed from the Solid Waste Disposal Act. It also argues that because the phrases "hazardous substance" and "hazardous waste" are used interchangeably, the definitions of "waste" are irrelevant.

This reasoning is unpersuasive for two reasons. First, Congress could have defined "disposal" for purposes of CERCLA any way it chose; it chose to import the meaning provided in SWDA. That meaning is clear. All CERCLA definitions, including for "disposal," are set forth in section 101 and apply to all subsequent sections, some of which also speak of "hazardous substances." No reason appears in the statutory scheme to give a term one meaning for one section but another for another. Second,

the fact that "hazardous substance" and "hazardous waste" may be used interchangeably goes to show that asbestos in non-waste form, such as insulation, was not meant to be covered: "both the terms hazardous *substance* and hazardous *wastes* are used, and their use is often interchangeable, because in the context of CERCLA, hazardous substances are generally dealt with at the point when they are about to, or have become, wastes." *Injuries And Damages From Hazardous Wastes – Analysis And Improvement Of Legal Remedies: A Report To Congress In Compliance With Section 301(e) of [CERCLA] By The "Superfund Section 301(e) Study Group"*, Part 1, p. 26.[14]

Stevens Creek points to no authority construing "disposal" as it suggests. However, courts in other circuits have construed "disposal" for purposes of section 107(a)(3)[15] as referring only to an affirmative act of discarding a substance as waste, and not to the productive

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[14] The interpretation of CERCLA given by the "distinguished panel of lawyers" who comprised the 301(e) Study Group has been accorded substantial weight by other federal courts. *See Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1437 (7th Cir.1988); *see also Electric Power Bd. of Chattanooga*, 716 F.Supp. at 1080 & n. 3.

[15] Section 107(a)(3) makes liable

> "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessels owned or operated by another party or entity and containing such hazardous substances. . . . "

use of the substance. *See, e.g. Prudential,* 711 F.Supp. at 1253-56 (sale of asbestos building materials is not "disposal" of asbestos under CERCLA); *Jersey City Redevelopment Auth. v. PPG Indus.,* 655 F.Supp. 1257, 1260-61 (D.C.N.J. 1987), aff'd, 866 F.2d 1411 (3d Cir.1988) (transaction involving transfer of hazardous substance is not "disposal" if it involved the sale of a product); *Edward Hines Lumber Co. v. Vulcan Materials Co.,* 685 F.Supp. 651, 654 (N.D.Ill.1988), *aff'd,* 861 F.2d 155 (7th Cir.1988) (sale of hazardous substance for use in wood treatment process does not constitute arranging disposal or treatment of hazardous substance, even where process run-off containing that substance had been placed at the site); *United States v. Westinghouse Elec. Corp.,* 22 E.R.C. (BNA) 1230 (S.D.Ind.1983) (sale of product containing toxic chemical for use in manufacturing does not constitute "disposal"). Because the definition applicable to actions under § 107(a)(2) and (a)(3) is the same, and there is no meaningful difference for purposes of CERCLA between a party who sells or transports a product containing or composed of hazardous substances for a productive use, and a party who actually puts that product to its constructive use, we see no reason to adopt a different definition in this case.[16]

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[16] Stevens Creek's contention that actions under section 107(a)(3) differ from 107(a)(2) actions in that they are essentially disguised products liability suits is unhelpful, because it fails to explain why one definition of "disposal" should apply in actions under section 107(a)(3), and another in actions under 107(a)(2).

B

Stevens Creek argues that CERCLA is to be broadly construed and that private remedies were intended to supplement, indeed supplant, governmental response to environmental threats. We agree that the Act is to be given a broad interpretation to accomplish its remedial goals. *See First United Methodist Church*, 882 F.2d 862; *see also Wickland Oil Terminals v. Asarco*, 792 F.2d 887, 891, 892 (9th Cir.1986). However we must reject a construction that the statute on its face does not permit, and the legislative history does not support.

CERCLA was designed to deal with the problem of inactive and abandoned hazardous waste disposal sites. U.S.Code Cong. & Admin.News 1980, at 6119, 6125; *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir.1985) (quoting F. Anderson, D. Mandelker, & A. Tarlock, *Environmental Protection: Law and Policy* 568 (1984)). Necessarily it was the product of many compromises. *Shore Realty*, 759 F.2d at 1040. Section 107 could have, but did not, explicitly provide for the problem of the release of asbestos fibers from materials that are part of the structure of a building.

The legislative history shows that Congress intended just what CERCLA provides on its face. *Id.*

CERCLA directly addresses the issue of removal of substances which are part of the structure of buildings in only one place: section 104(a)(3)(B) limits the authority of the President to respond "to a release or threat of release . . . from products which are part of the structure of, and result in exposure within, residential buildings or

business or community structures."[17] By its terms, section 104 is a limitation on governmental actions; section 104(a)(3)(B) refers to "the President" and applies to responses only "under this section."[18]

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[17] Section 104(a)(3)(B), 42 U.S.C. 9604(a)(3)(B), provides, in pertinent part:

> (3) Limitations on Response – The President shall not provide for a removal or remedial action under this section in response to a release or threat of release –
>
> . . . .
>
> (B) from products which are part of the structure [of], and result in exposure within, residential buildings or business or community structures;
>
> . . . .
>
> (4) Exception to Limitations – Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.

[18] Both Stevens Creek and Amicus argue that the district court erroneously concluded that section 104(a)(3)(B) is a limitation on private actions under section 107(a). While we agree that section 104(a)(3)(B) by its terms applies only to the President and not to private parties, we do not read the district court's order as holding to the contrary. The district court determined that "the provisions of CERCLA do not provide for the recovery of costs in this situation," then discussed section 104(a)(3)(B) before concluding that "it is unlikely that Congress would have intended to preclude the President from taking a specific action, while allowing private parties to respond by that precise action." We read the court as suggesting that the limitation in section 104(a) reinforces its determination that section 107 does not extend to Stevens Creek's claim.

Stevens Creek argues that since section 104(a)(3)(B) limits only governmental authority to respond to the presence of asbestos in the structure of a building, by inference, Congress intended that private parties would be able to recover under section 107(a). By the same token, it contends, the exception to the limitation provided in section 104(a)(4) that permits the President to act only if "no other person" is able to respond to a release or threatened release makes sense only if private parties are permitted to respond to these situations even if the federal government usually cannot.

We disagree. Congress has effectively precluded private party response actions through its "disposal" requirement in sections 107(a)(2) and (4). Even apart from this, there is no basis for inferring Congress' intent to create such a far-reaching private cause of action under section 107(a).

The only discussion of asbestos removal in the legislative history of CERCLA occurred during consideration of the Superfund Amendments and Reauthorization Act (SARA), Pub.L. No. 99-499, 1986 U.S.Code Cong. & Admin.News (100 Stat.) 1613, which was enacted in 1986. Section 112(b) of Senate Bill S. 51 contained the language now codified as Section 104(a)(3)(B) of CERCLA. The Senate Report prior to adoption of the SARA amendments to CERCLA discussed the extent of remedial or removal actions under the Bill:

> "CERCLA response authorities are extremely broad, but there are nevertheless situations, some of which may be lifethreatening, which are not within the law's scope. The [Environmental

> Protection] Agency has encountered some difficulties, primarily political, in restraining CERCLA responses to the scope of the law. For this reason, [the Senate Bill] proposes to make more explicit certain areas which the law does not cover.
>
> Specifically, [the Bill] makes clear the exclusion from remedial or removal action of a release or a threat of a release . . . – from products which are part of the structure of, and result in exposure within a facility. . . . The Environmental Protection Agency has received requests to take removal or remedial action in situations where the contamination was from building materials used in the structure and was creating an indoor hazard. This section would clarify that such situations are not subject to remedial or removal action."

S.Rep. No. 11, 99th Cong., 1st Sess. 16-17 (1985), *reprinted in* 1986 U.S.Code Cong. & Admin.News 2835.

A similar provision limiting response to releases of materials used in the structure of buildings appeared in § 117 of H.R. 2817, a bill passed by the House of Representatives on December 20, 1985. *See* Cooke, *The Law of Hazardous Waste – Management, Cleanup, Liability and Litigation* § 12.04[4][e] at 12-68 (1988); *see also* H.R.Rep. No. 253, 99th Cong., 1st Sess. 91, *reprinted in* 1986 U.S.Code Cong. & Admin.News 2835, 2873. After the bills were resolved in conference, the Conference Report discussed the limitation in terms specific to the President and to Section 104:

> Section 112(b) prohibits the President from undertaking a response action under section 104 in response to a release . . . from products which are part of the structure of residential buildings

> or businesses or community structures which result in exposure in such structures.

2.Conf.Rep. No. 962, 99th Cong., 2d Sess. (Joint Explanatory Statement of Conference Committee) 190 (1986); *reprinted in* 1986 U.S.Code Cong. & Admin.News 3276. As the committee report also indicated, the committee adopted the exact language of § 112(b) of Senate Bill S. 51, without indicating that it intended to modify the original meaning in any way. *Id.*

Whether or not Senate Report No. 11 is an authoritative guide to the legislative intent underlying this section,[19] the legislative history is devoid of evidence of a

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[19] *See First United Methodist Church*, 882 F.2d at 868-69 & n. 9, concluding that section 104(a)(3)(B) is a substantive limitation on the breadth of CERCLA itself. Given the fact that CERCLA provides that response costs are not recoverable unless they are "consistent with the national contingency plan," 42 U.S.C. § 9607(a)(4)(B), and the national contingency plan provides that a response action will be consistent if the person taking it acts in circumstances warranting removal consistent with § 300.65, which governs federal removal actions, 40 C.F.R. § 300.71(a)(2), it may be argued that there is some relationship between private party and government removal actions.

The United States, appearing as Amicus Curiae, urges us to take the opposite view, and conclude that section 104(a) limits only the federal government's ability to respond.

Even though as a general matter, "[t]he interpretation of an agency charged with the administration of a statute is entitled to substantial deference, if it is a sensible reading of the statutory language, . . . and if it is not inconsistent with the legislative history," *Lawrence Co. v. Lead-Deadwood School Dist.*, 469 U.S. 256, 262, 105 S.Ct. 695, 83 L.Ed.2d 635 (1985), we feel no

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Congressional intent to authorize a private cause of action for the recovery of response costs for the removal of asbestos from a building. In the absence of clear evidence of Congress' intent to create a private cause of action, we decline to imply one.

To recognize a private cause of action under Section 107(a)(2) for the voluntary removal of asbestos from a commercial building would have substantial and far-reaching legal, financial, and practical consequences. As the Fourth Circuit has observed:

> [t]o extend CERCLA's strict liability scheme to all past and present owners of buildings containing asbestos as well as to all persons who manufactured, transported, and installed asbestos products into buildings, would be to shift literally billions of dollars of removal cost liability based on nothing more than an improvident interpretation of a statute that Congress never intended to apply in this context. Certainly, if Congress had intended for CERCLA to address the monumental asbestos problem, it

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such obligation in this case. As counsel for Amicus conceded during argument, the EPA has not formulated an official interpretation of section 107(a)(2)(B) as it applies to the removal of asbestos from the structure of a commercial building. The litigation arguments of the United States in its amicus brief, which lists an EPA lawyer as "of counsel," are not an "agency interpretation" of CERCLA such as to invoke the customary rule of deference.

In any event we believe it is unnecessary for us to decide whether section 104(a)(3)(B) is a limitation on private parties as well as the government. We simply consider it along with all other relevant legislative history.

> would have said so more directly when it passed [the 1986 "Superfund" amendments to CERCLA].

First United Methodist Church, 882 F.2d at 869 (citation and footnote omitted). *Accord Retirement Community Developers v. Merine*, 713 F.Supp. 153, 158 (D.Md. 1989).

AFFIRMED.

PREGERSON, Circuit Judge, dissenting:

I dissent. The majority's opinion is based on a numbing, highly technical analysis of CERCLA definitions and provisions. "CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). Congress enacted CERCLA "to provide a comprehensive response to the problem of hazardous substance release." *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890 (9th Cir.1986). The purposes underlying this remedial statute should not be frustrated by the narrow interpretations inflicted on it by the majority opinion.

CERCLA provides several complementary mechanisms to effectuate hazardous substance removal.[1] The legislation also addresses the problems of compensation and liability in the wake of a release or threatened release

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[1] The federal government may conduct its own removal of hazardous substances or remedial actions necessary for such removal by using money from the Superfund. 42 U.S.C. § 9604. In certain instances the federal government may compel the parties responsible for the release of hazardous substances to clean up the site where the hazardous substances are found. 42 U.S.C. § 9606.

of a hazardous substance.[2] Private cost recovery actions for clean up costs are a central part of CERCLA.[3] The availability and independence of these causes of action are now clearly recognized by the courts. *See id.* at 892 ("private enforcement actions under section 107(a) . . . [are] independent of governmental actions financed by Superfund").

Section 107(a)(2) remedies apply only to a narrow private class of property owners who may be held responsible for the effects of a hazardous substance they caused to be placed on their property and failed to remove when they later sold the property. As argued by the United States in its amicus brief, the government has an interest in encouraging private parties to respond to releases of hazardous substances, because private cleanups conserve the resources of EPA and the Superfund, and enhance EPA's effort to deal with the massive problem of improper disposal of hazardous substances.[4]

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[2] Either the federal government or a private party may recover the costs of response action from parties determined to be liable under section 107 of the Act. 42 U.S.C. § 9607.

[3] "[T]he liability provisions of section 107 are an essential part of the structure established by CERCLA because the resources of the Fund alone are simply insufficient to provide an adequate remedy to the national problem of hazardous waste disposal." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1082 (1st Cir.1986).

[4] "Asbestos is a known human carcinogen that causes lung cancer, mesothelioma (a cancer of the chest and abdominal lining) and is also linked to other cancers. It has been estimated that 3,300 to 12,000 cancer cases a year occur in the United States as a result of past exposure to asbestos; almost

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I cannot agree that Congress "effectively precluded private party response actions through its 'disposal' requirement." Majority opinion at 12527.[5] The "disposal"

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all of these cancer cases are fatal. In addition, asbestos causes asbestosis (a serious lung disorder). About 65,000 persons in the United States are estimated to be suffering from asbestosis today." 51 Fed.Reg. 3738 (1986) (introduction to proposed rule on ban of asbestos products).

Because of the health risks presented by the release of asbestos fibers into the environment, the EPA has for the first time used its authority under section 6 of the Toxic Substances Control Act to place a *comprehensive ban* on a dangerous substance. *See* 20 Env't Rep. (BNA) 534 (July 14, 1989) (reporting EPA Administrator William K. Reilly's remarks at a press conference announcing the ban) (emphasis added). Determining that "piecemeal control of the risks [presented by airborne asbestos fibers] is not satisfactory; only elimination of asbestos to the extent feasible will produce acceptable reduction of risks," 51 Fed.Reg. 3738, the EPA has issued a rule which will prohibit the manufacture and distribution of asbestos in this country for 94% of present asbestos product uses by 1996. 20 Env't Rep. (BNA) 534 (July 14, 1989); *see* 40 C.F.R. Part 763.

[5] The majority bases its analysis on the questionable proposition that "disposal" refers only to the placement of "hazardous wastes," not of "hazardous substances." This proposition fails to take into account the very language of the statute which refers repeatedly to the "disposal of hazardous substances." *See* §§ 107(a)(2), (a)(3) and (a)(4). The specific reference in the section to hazardous substances overrides the borrowed Solid Waste Disposal Act's limited definition of disposal. *See* Hartigan, *Asbestos Abatement Cost Recovery Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 14 Harv.Envtl.L.Rev. 253, 258-60 (1990) (contending that recovery of costs for removal of asbestos from buildings properly fits within the plain language and congressional intent of

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requirement does *not* clearly show that Congress intended to preclude private party liability for installing the hazardous substance – asbestos – within private structures. Interpretation of the term "disposal" to include installation of asbestos insulation and fire retardants in private buildings lies at the heart of the issue of potential liability under 107(a)(2). Depending on the facts, the installation of asbestos in private structures could fall within the definition of "disposal" and thus result in potential liability under section 107(a)(2) for clean up cost recovery. Because the district court never addressed this issue, we should remand the matter with directions to determine whether the facts of this case satisfy the "disposal" requirement.

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CERCLA). Case law also tends to use the terms "hazardous waste" and "hazardous substance" interchangeably when referring to CERCLA requirements. *See New York v. General Elec. Co.*, 592 F.Supp. 291, 296 (N.D.N.Y.1984) ("[I]t appears that Congress sought to deal with every conceivable area where *hazardous substances* come to be located. . . . ") (emphasis added); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir.1986) ("[A liberal] reading of the statute serves . . . congressional purposes by preserving the limited resources of the Fund and by ensuring that liability will be apportioned among parties responsible for the release of *hazardous substances* whenever possible.") (emphasis added); *Cadillac Fairview/California v. Dow Chemical Co.*, 840 F.2d 691, 693 (9th Cir.1988) ("Section 107(a)(2)(B) expressly creates a private claim against any person who owned or operated a facility at the time hazardous substances were disposed of at the facility for recovery of necessary costs of responding to the *hazardous substances* incurred consistent with the national recovery plan.") (emphasis added).

The widespread use of asbestos in private building structures presents an extensive problem for which there is no common law remedy.[6] Precisely because of the widespread nature of the problem, government Superfund resources are not sufficient to deal with these clean-up costs. Thus, without recognition of a statutory remedy of a private cause of action under section 107(a)(2), there will be no effective remedy for the damage and injury caused by the existence of asbestos in private structures.

Underlying the majority's refusal to recognize section 107(a)(2) private actions in the context of asbestos removal from private structures is the argument that there is no case law to support the action. Given that this is an issue of first impression in the circuits, and one not at all settled among the district courts, this argument carries little water. If recent cases are any example, neither the courts nor the litigants are clear about how to

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[6] Recovery for damages caused by asbestos in the private sector is uncertain. Where exposure to friable asbestos has caused *personal* injury, individual parties have been able to sue asbestos manufacturers under traditional tort theories. *See, e.g., Beshada v. Johns-Manville Prods. Corp.* 90 N.J. 191, 447 A.2d 539 (1982); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir.1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974). But tort litigation for *property* damages and economic loss due to asbestos installations is more problematic. Generally speaking, the problem of "rooting out the asbestos that is now an unwelcome resident in thousands of structures throughout the United States," W. Rogers, Environmental Law: Pesticides and Toxic Substances § 6.8, at 460 (1988), does not fall within the classic tort parameters of culpable party and innocent victim.

proceed when private structure asbestos clean up issues arise under CERCLA. Some of the cases are brought under common law tort and property theories, using CERCLA language as a guide to liability. *See, e.g., First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862 (4th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1113, 107 L.Ed.2d 1020 (1990); *Elec. Power Bd. v. Westinghouse Elec. Corp.*, 716 F.Supp. 1069 (E.D.Tenn.1988). Others merely announce a CERCLA private cause of action as one of several claims against a potentially liable defendant. *See, e.g., Mercer Univ. v. Nat'l Gypsum Co.*, 258 Ga. 365, 368 S.E.2d 732 (1988).

Finally, the majority's concern that a finding of private liability under section 107(a)(2) would cause far-reaching financial and practical problems is misplaced. The extensive use of asbestos materials in commercial properties has already had a "profound, continuing economic impact on the real estate industry." 19 Env't Rep. (BNA) 1154 (Oct. 7, 1988) (remarks of H.L. Van Varick, executive vice president of the American Savings Bank of New York City to Senate Environment and Public Works Subcommittee on Hazardous Wastes and Toxic Substances). "Asbestos is a deal killer." 19 Env't Rep. (BNA) 1664 (Dec. 16, 1988) (remarks of Robert Andre of the Seattle law firm of Ogden, Ogden, Murphy & Wallace). Recognition of an effective, statutory remedy for dealing with asbestos clean-up costs in private structures could at least give the parties to a real estate transaction a tool for apportioning clean up responsibilities.

I believe section 107(a)(2) creates a private cause of action in certain situations for the recovery of clean up costs of asbestos installed in the structure of private

buildings. The issue whether 3550 Stevens Creek Associates has satisfied the requirements of the section and can prevail in the private action should be remanded to the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

3550 STEVENS CREEK ASSOCIATES, a Limited Partnership, Plaintiff, vs. BARCLAYS BANK OF CALIFORNIA, a California banking corporation, Defendant.	NO. C-87-20672-RPA ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS FILED SEP 28 1988

The Court has received, read, and considered defendant's motion for judgment on the pleadings, or, in the alternative, motion for summary judgment, and the opposition thereto. The Court also heard the oral arguments presented by counsel at the hearing held on September 16, 1988. GOOD CAUSE appearing therefor, the Court finds and orders as follows.

Rule 12(c) of the Federal Rules of Civil Procedure provides that any party may move for judgment on the pleadings, but that, if on such motion, matters are presented outside the pleadings, then the motion shall be treated as a motion for summary judgment. However, in the instant case, it does not appear necessary to rely upon matters outside of the pleadings. Therefore, the Court shall treat this motion as a motion for judgment on the pleadings, rather than as a motion for summary judgment.

Plaintiff has filed this action pursuant to 42 U.S.C. § 9607(a)(2)(B), which provides that a former owner or operator of any facility at which hazardous substances were disposed of is liable for necessary costs of response incurred by another person, as long as such costs are consistent with the national contingency plan.

There can be no dispute that asbestos is a hazardous substance, covered under the provisions of the Comprehensive Environmental Response Compensation and Liability Act of 1980. Rather, the controversy in the present case stems from the statutory language, "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,. . . . " 42 U.S.C. § 9607(a)(2).

Defendant contends that it did not dispose of any hazardous material. Rather, defendant owned a commercial building which was composed of asbestos material, which plaintiff chose to remove after purchasing the building from defendant.

The subject building, located at 3550 Stevens Creek Boulevard, was constructed in 1963 by First Valley Corporation. The building contained asbestos insulation, as well as fire retardants. In 1969, Barclays Bank acquired First Valley's assets and First Valley Corporation was dissolved in 1971. Barclays then acquired title to the property, and sold said title to plaintiff in 1984.

From 1984 through 1986, plaintiff remodeled the building, expending over $100,000.00 in removing asbestos from the building. Plaintiff now seeks, pursuant to CERCLA, the costs of this removal from defendant. Defendant claims that it is not liable for the voluntary

removal costs which plaintiff incurred, due to the fact that defendant did not dispose of hazardous waste material at the site.

Defendant is correct in asserting that the provisions of CERCLA do not provide for the recovery of costs in this situation. CERCLA was enacted to "provide a comprehensive response to the problem of hazardous substance release." *Wickland Oil Terminal v. Asarco, Inc.*, 792 F.2d 887, 890 (9th Cir. 1986). However, the statute does not directly address the problem of removal of asbestos from buildings. Section 9604 of the Act, which discusses the responses to be taken by the President, does state,

> The President shall not provide for a removal or remedial action under this section in response to a release or threat of release –
>
> . . . .
>
> . . . (B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; . . . .

Although this Section addresses only the actions which the President shall and shall not take, rather than the response which private parties may or may not take, the Court finds that it is unlikely that Congress would have intended to preclude the President from taking a specific action, while allowing private parties to respond by that precise action.

In any event, even assuming that Congress did intend precisely such a result, that intent is not clear and is not expressed in the statute. Accordingly, this Court is not prepared to grant the plaintiff in the instant case

relief pursuant to the provisions of CERCLA, when no authority exists for the award of such relief.

Based upon the foregoing, the Court hereby GRANTS defendant's motion for judgment on the pleadings and DISMISSES this action with prejudice.

IT IS SO ORDERED.

DATED: September 28, 1988

/s/ Robert P Aguilar
ROBERT P. AGUILAR
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

3550 STEVENS CREEK ASSOCIATES, a Limited Partnership, Plaintiff, vs. BARCLAYS BANK OF CALIFORNIA, a California Banking Corporation, Defendant.	No. C 8720672 RPA JUDGMENT FILED OCT 17 1988

Defendant Barclays Bank of California having moved for Judgment on the Pleadings pursuant to Rule 12(c) and Rule 56 of the Federal Rules of Civil Procedure, and the said motion having come on for hearing before the Honorable Robert P. Aguilar, United States District Judge, and the Court thereafter on September 28, 1988, having handed down its opinion granting the said motion and dismissing this action with prejudice, it is,

ORDERED, ADJUDGED, AND DECREED, that the complaint be and is hereby dismissed on all counts, and that defendant recover its costs from plaintiff.

DATED: October 17, 1988

/s/ Robert P. Aguilar
Robert P. Aguilar
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

3550 STEVENS CREEK ASSOCIATES, a Limited Partnership, Plaintiff-Appellant, v. BARCLAYS BANK OF CALIFORNIA, Defendant-Appellee.	No. 88-15503 D.C. No. CV-87-20672-RPA ORDER FILED NOV 29 1990

Before: FARRIS, PREGERSON and RYMER, Circuit Judges

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

3550 STEVENS CREEK ASSOCIATES, A Limited Partnership, Plaintiff, vs. BARCLAYS BANK OF CALIFORNIA, A California Banking Corporation, Defendant.	No: C87 20672 RPA COMPLAINT FOR DAMAGES PURSUANT TO C.E.R.C.L.A. [42 U.S.C. §9607]; DECLARATORY RELIEF PURSUANT TO C.E.R.C.L.A. [42 U.S.C. §9613]; Jury Trial Demanded FILED OCT 09 1987

JURISDICTION

1. This action arises under Title 42 of the United States Code §§9607 and 9613. Jurisdiction and venue are conferred on this Court under Title 28 of the United States Code §§1331, 1343, and 1391(b), and 42 U.S.C. §9613(b).

PARTIES

2. Plaintiff 3550 STEVENS CREEK ASSOCIATES, a limited partnership, is, and at all times relevant hereto was, a California limited partnership, with its principal place of business within this judicial district.

3. Defendant BARCLAYS BANK OF CALIFORNIA, a California banking corporation (hereinafter "BARCLAYS"), is, and at all times relevant hereto was, a California banking corporation, duly licensed by the California State Banking Department, with its principal place of business in San Francisco, California.

GENERAL ALLEGATIONS

4. Plaintiff is informed and believes and thereon alleges that at all relevant times alleged herein, First Valley Bank was a California corporation, duly qualified to transact business in California. Plaintiff is informed and believes and thereon alleges that First Valley Bank at all times relevant herein managed, operated, and owned all of the stock of a wholly owned subsidiary corporation known as First Valley Corporation, a California corporation.

5. Plaintiff is informed and believes and thereon alleges that in or about 1963 and 1964, First Valley Corporation owned, managed, and completed the construction of a certain office building located at 3550 Stevens Creek Boulevard, San Jose, California. During the construction, materials hazardous to human health in the form of asbestos insulation and fire retardant materials, were pumped, poured, injected, and otherwise installed into

said structure by virtue of its being sprayed on steel columns and floor supports throughout the building.

6. Plaintiff is informed and believes and thereon alleges that in or about the latter half of 1969, pursuant to an Agreement for Purchase and Sale of Assets dated May 27, 1969, Defendant BARCLAYS purchased the assets of First Valley Bank, said assets including, but not limited to, the entire shareholding of First Valley Bank in its wholly owned subsidiary corporation, First Valley Corporation. A true and correct copy of said Agreement is attached hereto as Exhibit "A". Pursuant to and by the terms of said Agreement, Plaintiff is further informed and believes and thereon alleges that BARCLAYS expressly and impliedly assumed all of the liabilities, obligations and commitments of First Valley Bank. Plaintiff is further informed and believes and thereon alleges that said liabilities assumed include, but are not limited to, First Valley Bank's liabilities for the acts and omissions of its wholly owned subsidiary, First Valley Corporation.

7. Plaintiff is informed and believes and thereon alleges that sometime after the execution of said Agreement, First Valley Bank changed its corporate name to FVB Corporation, a California corporation, and thereafter dissolved. On or about January 14, 1970, FVB Corporation filed with the Office of the Secretary of State of the State of California a "Certificate of Winding Up and Dissolution of FVB Corporation."

8. On or about September 30, 1971, First Valley Corporation, a California corporation, filed with the Office of the Secretary of State of the State of California a "Certificate of Winding Up and Dissolution of First Valley

Corporation, a California Corporation." Said document provides, among other things, that all of the known assets of First Valley Corporation have been distributed to its shareholders. Plaintiff is informed and believes and thereon alleges that at or about the time of the filing of said Certificate, Defendant BARCLAYS was the sole shareholder of First Valley Corporation, and that it received all of the assets of First Valley Corporation, thereby resulting in a merger, or de facto merger, of First Valley Corporation into Defendant BARCLAYS. As a result of said merger, or de facto merger, BARCLAYS assumed all of the liabilities of First Valley Corporation.

9. Plaintiff is informed and believes and thereon alleges that on or about October 1971, a transfer of title to the real property and improvements thereon located at 3550 Stevens Creek Boulevard, San Jose, California, from First Valley Corporation to BARCLAYS was recorded in the County of Santa Clara. Plaintiff is further informed and believes and thereon alleges that said transfer of record title to BARCLAYS from First Valley Corporation was incident to the dissolution of First Valley Corporation.

10. On or about April 11, 1984, Emo Biagini, and Theodore J. Biagini, entered into a written contract for the purchase of said building located at 3550 Stevens Creek Boulevard, San Jose, California. A true and correct copy of said written agreement is attached hereto as Exhibit "B." Thereafter, Emo Biagini and Theodore J. Biagini assigned said written agreement to plaintiff, and said individuals were, and are, general partners of the plaintiff. Subsequently, at the time of the close of escrow for said transaction, on or about May 1, 1984, title to said

building was transferred to plaintiff, 3550 STEVENS CREEK ASSOCIATES, a limited partnership.

11. In or about the fall of 1984, and, thereafter, in or about the summer of 1985, and the fall of 1986, plaintiff undertook substantial expenditures and efforts to respond (as defined in 42 U.S.C. §9601(25)) to the existence of the hazardous materials in the form of asbestos which had previously been installed in the building during its construction.

12. Such response costs were necessary and consistent with the National Contingency Plan, and amounted to a sum in excess of $100,000.00.

13. In addition to such response costs, plaintiff also suffered damages in the approximate sum of $12,000.00. As a direct and proximate result of the measures undertaken by plaintiff in or about fall 1984 to respond to the presence of the hazardous material in the form of asbestos in the structure, plaintiff was unable to deliver up timely possession to one of its tenants in the building, resulting in a rental offset in the approximate sum of $12,000.00.

FIRST CAUSE OF ACTION
[C.E.R.C.L.A. – 42 U.S.C. §9607]

14. Plaintiff hereby incorporates by reference as though fully set forth herein paragraphs 1 through 13, inclusive, of the Complaint.

15. As alleged herein, the response costs were necessary and consistent with the National Contingency Plan.

16. Such response costs amounted to a sum in excess of $100,000.00.

17. As a result of the facts and transactions alleged herein, BARCLAYS has become and is now liable to plaintiff under 42 U.S.C. §9607 for the necessary costs of response incurred by it consistent with the National Contingency Plan as alleged herein.

WHEREFORE, plaintiff prays for judgment as hereafter set forth.

SECOND CAUSE OF ACTION
[Declaratory Relief – 42 U.S.C. §9613]

18. Plaintiff hereby incorporates by reference as though fully set forth herein paragraphs 1 through 13, inclusive, and paragraphs 15 through 17, inclusive, of the Complaint.

19. An actual controversy has arisen and now exists between plaintiff and defendant BARCLAYS concerning their respective rights and duties in that plaintiff contends that defendant is liable for all response costs and damages suffered by plaintiff, including future response costs and damages, whereas defendant BARCLAYS maintains that it is not so liable for either previously incurred response costs or response costs to be incurred by plaintiff in the future.

20. Plaintiff desires a judicial determination of its rights and duties, and a declaration that defendant is liable for all response costs and damages suffered by plaintiff, such declaratory judgment to be binding in any

subsequent action or actions against defendant to recover further response costs or damages.

21. A judicial declaration is necessary and appropriate at this time in order that plaintiff may ascertain its rights and duties with respect to responding to the existence and threat of the hazardous materials in the form of asbestos currently in the building, so that it may, among other things, take appropriate action to respond in the future thereto; and, is further required by 42 U.S.C. §9613(g)(2).

WHEREFORE, plaintiff prays for judgment against defendant as follows:

1. For damages in an amount in excess of $100,000.00, and as according to proof representing the response costs incurred by plaintiff as alleged herein;

2. For a judicial declaration that defendant is liable to plaintiff for all response costs previously incurred by plaintiff, and all response costs to be incurred by plaintiff, with respect to the subject property;

3. For costs of suit incurred herein; and

4. For such other and further relief that the Court may deem proper.

Dated: October 9, 1987.

Levy, Greenfield & Davidoff

By BERNARD S. GREENFIELD
BERNARD S. GREENFIELD
Attorneys for Plaintiff
3550 STEVENS CREEK ASSOCIATES

[Exhibits omitted]

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

3550 STEVENS CREEK ASSOCIATES, A Limited Partnership, Plaintiff, v. BARCLAYS BANK OF CALIFORNIA, A California Banking Corporation, Defendant.	NO. C 87 20672 RPA ANSWER OF DEFENDANT BARCLAYS BANK OF CALIFORNIA TO COMPLAINT FOR DAMAGES PURSUANT TO C.E.R.C.L.A. AND FOR DECLARATORY RELIEF PURSUANT TO C.E.R.C.L.A. Jury Trial Demanded

Defendant Barclays Bank of California ("Barclays") answers plaintiff's Complaint as follows:

JURISDICTION AND VENUE

1. Answering paragraph 1, Barclays admits that jurisdiction and venue are conferred on this court under 28 U.S.C. §§ 1331 and 1391(b), and 42 U.S.C. § 613(b).

Except as expressly admitted herein Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein, and therefore denies generally and specifically each and every allegation contained therein.

PARTIES

2. Answering paragraph 2, Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein, and therefore denies generally and specifically each and every allegation contained therein.

3. Answering paragraph 3, Barclays admits that it is a California banking corporation, duly licensed by the California State Banking Department, with its principal place of business in San Francisco, California. Except as expressly admitted, Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein and therefore denies generally and specifically each and every allegation contained therein.

GENERAL ALLEGATIONS

4. Answering paragraph 4, Barclays admits that First Valley Bank was a California Corporation duly qualified to transact business in California. Barclays further admits that First Valley Corporation, a California Corporation, was a wholly owned subsidiary corporation of First Valley Bank. Except as expressly admitted, Barclays lacks information or belief to enable it to answer the

allegations contained therein and therefore denies generally and specifically each and every allegation contained therein.

5. Answering paragraph 5, Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein, and therefore denies generally and specifically each and every allegation contained therein.

6. Answering paragraph 6, Barclays admits that it purchased certain of the assets of First Valley Bank and that it entered into an Agreement for Purchase and Sale of Assets in substantially the form attached to the Complaint as Exhibit "A" incident to said purchase. Barclays further admits that it assumed certain, but not all, of First Valley Bank's liabilities in connection with said purchase. Except as expressly admitted, Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein and therefore denies generally and specifically each and every allegation contained therein.

7. Answering paragraph 7, Barclays admits that First Valley Bank changed its corporate name to FVB Corporation, a California corporation, and thereafter dissolved. Barclays further admits that on or about January 14, 1970, FVB Corporation filed with the Office of the Secretary of State of the State of California a "Certificate of Winding Up and Dissolution of FVB Corporation."

8. Answering paragraph 8, Barclays admits that on or about September 30, 1971, First Valley Corporation, a California corporation, filed with the Office of the Secretary of State of the State of California, a "Certificate of Winding Up and Dissolution of First Valley Corporation,

a California Corporation." Barclays further admits that the document states that all of the known assets of First Valley Corporation have been distributed to the shareholders. Except as expressly admitted, Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein and therefore denies generally and specifically each and every allegation contained therein, and Barclays specifically denies that any merger or de facto merger ever occurred between Barclays and First Valley Corporation.

9. Answering paragraph 9, Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein and therefore denies generally and specifically each and every allegation contained therein.

10. Answering paragraph 10, Barclays admits that Emo Biagini and Theodore J. Biagini executed a written contract in substantially the form attached to the Complaint as Exhibit "B" for the purchase of the property known as 3550 Stevens Creek Boulevard, San Jose, California. Except as expressly admitted, Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein and therefore denies generally and specifically each and every allegation contained therein.

11. Answering paragraph 11, Barclays denies that any alleged expenditures or efforts of plaintiff are a "response" within the meaning of 42 U.S.C. § 9601(25). Barclays lacks information or belief sufficient to enable it to answer the other allegations contained therein and

therefore denies generally and specifically each and every such allegation.

12. Answering paragraph 12, Barclays denies generally and specifically each and every allegation contained therein.

13. Answering paragraph 13, Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein and therefore denies generally and specifically each and every allegation contained therein. Further, Barclays specifically denies that plaintiff suffered damages in the approximate sum of $12,000.00, or in any sum, or at all.

FIRST CAUSE OF ACTION
[C.E.R.C.L.A. – 42 U.S.C. § 9607]

14. Answering paragraph 14, Barclays refers to and by such reference incorporates as if fully set forth herein its previous responses to each of the paragraphs referred to in paragraph 14 of plaintiff's Complaint.

15. Answering paragraph 15, Barclays denies generally and specifically each and every allegation contained therein.

16. Answering paragraph 16, Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein, and therefore denies generally and specifically each and every allegation contained therein.

17. Answering paragraph 17, Barclays denies generally and specifically each and every allegation contained therein.

SECOND CAUSE OF ACTION
[Declaratory Relief – 42 U.S.C. § 9613]

18. Answering paragraph 18, Barclays refers to and by such reference incorporates as though fully set forth herein its previous responses to each of the paragraphs referred to in paragraph 18 of plaintiff's Complaint.

19. Answering paragraph 19, Barclays admits that an actual controversy has arisen and now exists between plaintiff and Barclays concerning their respective rights and duties. Barclays further admits that it contends that it is not liable for any response costs or damages incurred or to be incurred by plaintiff. Except as expressly admitted, Barclays lacks information or belief sufficient to enable it to answer the allegation contained therein and therefore denies generally and specifically each and every allegation contained therein.

20. Answering paragraph 20, Barclays lacks information or belief sufficient to enable it to answer the allegations contained therein and therefore denies generally and specifically each and every allegation contained therein.

21. Answering paragraph 21, Barclays denies generally and specifically each and every allegation contained therein.

FIRST AFFIRMATIVE DEFENSE
(FAILURE TO STATE A CLAIM FOR RELIEF)

22. Plaintiff's Complaint and each of the alleged claims for relief therein, fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE (STATUTE OF LIMITATIONS)

23. Plaintiff's Complaint, and each and every claim for relief stated therein, is barred by the appropriate Statute of Limitations, to-wit, 42 U.S.C. § 9613(g)(2).

THIRD AFFIRMATIVE DEFENSE (ESTOPPEL)

24. Plaintiff is precluded from asserting the within claims for relief against Barclays in that plaintiff's claims for relief are barred by the doctrine of estoppel.

FOURTH AFFIRMATIVE DEFENSE (ACTS OR OMISSIONS OF THIRD PARTIES)

25. Plaintiff is precluded from asserting the within claims for relief against Barclays in that the acts or omissions complained of by plaintiff were in fact acts or omissions of third parties other than employees or agents of Barclays, and which acts or omissions did not occur in connection with any contractual relationship existing directly or indirectly with Barclays.

FIFTH AFFIRMATIVE DEFENSE (UNCLEAN HANDS)

26. Some or all of plaintiff's claims for relief are barred by the doctrine of unclean hands.

SIXTH AFFIRMATIVE DEFENSE (APPORTIONMENT OF LIABILITY)

27. If Barclays is liable for response costs under 42 U.S.C. § 9607(a) then plaintiff is also liable for such costs,

and the parties' respective liability must be apportioned between the parties using such equitable factors as the Court determines to be appropriate and any recovery should be reduced according to such apportionment.

WHEREFORE, Barclays prays as follows:

1. That plaintiff take nothing by its complaint herein and that the same be dismissed with prejudice;

2. That judgment be entered in favor of Barclays, with costs of suit, including reasonable attorney fees; and

3. That the Court award such further relief as it deems just and proper.

Dated: November 23, 1987

JORDAN, KEELER & SELIGMAN
J. MORROW OTIS
PAUL R. KENNEY
JEREMY W. KATZ

By /s/ Jeremy W. Katz
Jeremy W. Katz
Attorneys for Defendant
Barclays Bank of
California

FILED
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No. 90-1357

In The

Supreme Court of the United States

October Term, 1990

3550 STEVENS CREEK ASSOCIATES,

Petitioner,

v.

BARCLAYS BANK OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a private party may recover its response costs under Section 107(a)(2)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(2)(B), for the voluntary removal of fireproofing and insulation containing asbestos from a commercial building.

2. Whether the installation of fireproofing and insulation containing asbestos during construction of a commercial building constitutes a "disposal" of hazardous waste under Section 107(a)(2)(B).

RULE 29.1 LIST

Respondent Barclays Bank of California was acquired by Wells Fargo Bank, N.A., effective June 1, 1988. Wells Fargo Bank, N.A. is wholly owned by Wells Fargo and Company, a Delaware corporation. Wells Fargo Bank, N.A. has no subsidiaries or affiliates to list pursuant to Rule 29.1. Wells Fargo and Company's subsidiaries are wholly owned except for Wells Fargo Nikko Investment Advisors.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.1 LIST ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

1. There Is No Conflict In Decisions Or Any Important Federal Question To Review 3

   A. The Disposal Requirement 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

CASES

Anthony v. Blech, ___ F.Supp. ___, 1991 U.S. Dist. LEXIS 4226 (C.D. Cal. 1991) 3

Corporation of Mercer University v. National Gypsum Co., 24 Envt. Rep. Cas. (BNA) 1953 (N.D.Ga. 1986) 3

Covalt v. Carey Canada, In., 860 F.2d 1434 (7th Cir. 1988) 6

Dayton Independent School District v. U.S. Mineral Products Co., 906 F.2d 1059 (5th Cir. 1990) 3

Edward Hines Lumber Company v. Vulcan Materials Co., 685 F.Supp. 651 (N.D. Ill. 1988), aff'd., 861 F.2d 155 (7th Cir. 1988) 6

First United Methodist Church v. United States Gypsum Co., 882 F.2d 862 (4th Cir. 1989), *cert. den.*, ___ U.S. ___, 110 S.Ct. 1113, 107 L.Ed.2d 1020 (1990) 3, 6

Jersey City Redevelopment Authority v. PPG Industries, 655 F.Supp. 1257 (D.C.N.J. 1987), aff'd., 866 F.2d 1411 (3rd Cir. 1988) 6

Prudential Insurance Company of America v. United States Gypsum, 711 F.Supp. 1244 (D. N.J. 1989) ... 3, 6

Retirement Community Developers, Inc. v. Merine, 713 F.Supp. 153 (D. Md. 1989) 3

Smith Land and Improvement Corp. v. Celotex Corp., 851 F.2d 86, (3rd Cir. 1988), *cert. den.*, 488 U.S. 1029, 109, S.Ct. 837, 102 L.Ed.2d 969 (1989) 3

United States v. Fleet Factors Corporation, 901 F.2d 1550, reh. den., 911 F.2d 742 (11th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S.Ct. 752 (1991) 3

TABLE OF AUTHORITIES – Continued

Page(s)

United States v. Metate Asbestos Corp., 584 F.Supp. 1143 (D. Ariz. 1984) 3

United States v. Westinghouse Electric Corp., 22 Envt. Rep. Cas. (BNA) 1230 (S.D. Ind. 1983) 6

STATUTES AND REGULATIONS

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. Section 9601, et seq. ..... *passim*

Solid Waste Disposal Act, 42 U.S.C. §§ 6903(3), (5) and (27) 5

40 C.F.R. § 261.2(e)(1)(i) 5

No. 90-1357

In The

Supreme Court of the United States

October Term, 1990

3550 STEVENS CREEK ASSOCIATES,

Petitioner,

v.

BARCLAYS BANK OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Barclays Bank of California ("Barclays") respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 915 F.2d 1355 (1990).

STATEMENT OF THE CASE

In 1963 or 1964, First Valley Corporation completed construction of an office building located at 3550 Stevens

Creek Boulevard in San Jose, California ("the building"). Building materials used in construction included asbestos insulation and fire-retardant materials containing asbestos. In 1969 Barclays purchased the assets of First Valley Bank which assets included First Valley Bank's wholly owned subsidiary First Valley Corporation. First Valley Corporation was dissolved in 1971 at which time Barclays took title to the building. Petitioner 3550 Stevens Creek Associates ("Stevens Creek") acquired the property from Barclays in April 1984. Sometime thereafter Stevens Creek renovated the building and voluntarily commenced removal of the asbestos which had been installed over 20 years earlier when the building was constructed.

In this action Stevens Creek attempted to shift the cost of asbestos removal to Barclays pursuant to Section 107(a)(2)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The District Court dismissed Stevens Creek's complaint noting that Barclays "did not dispose of hazardous waste material" and thus "the provisions of CERCLA do not provide for the recovery of costs in this situation." *See* Appendix to Stevens Creek's Petition ("App.") at page 34.

On appeal the Ninth Circuit affirmed the dismissal because the asbestos complained of had been installed as a building material and not disposed of within the meaning of Section 107(a)(2). App. 16. The Ninth Circuit also concluded that even apart from the disposal requirement "there was no basis for inferring Congress' intent to create such a far-reaching private cause of action under Section 107(a)." App. 21.

REASONS FOR DENYING THE WRIT

1. There Is No Conflict In Decisions Or Any Important Federal Question To Review.

Stevens Creek's Petition describes no new issues but merely resurrects arguments rejected by the District Court and the Court of Appeals. Stevens Creek also asserts the existence of a conflict among the federal courts where there is none.

Every federal court which has had occasion to consider whether a private party may recover its response costs under Section 107(a) for removal of asbestos containing building materials has concluded that CERCLA does not provide such a remedy. *See First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 867-69 (4th Cir. 1989), *cert. den.*, ___ U.S. ___, 110 S.Ct. 1113, 107 L.Ed.2d 1020 (1990); *Dayton Independent School District v. U.S. Mineral Products Co.*, 906 F.2d 1059 (5th Cir. 1990); *Anthony v. Blech*, ___ F.Supp. ___, 1991 U.S. Dist. LEXIS 4226 (C.D. Cal. 1991); *Retirement Community Developers, Inc. v. Merine*, 713 F.Supp. 153, 156-58 (D. Md. 1989); *Prudential Insurance Company of America v. United States Gypsum*, 711 F.Supp. 1244, 1251 (D. N.J. 1989); and *Corporation of Mercer University v. National Gypsum Co.*, 24 Envt. Rep. Cas. (BNA) 1953 (N.D.Ga. 1986).[1]

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[1] Stevens Creek attempts to fabricate a conflict among the federal courts by reference to the decision of the Eleventh Circuit in *United States v. Fleet Factors Corporation*, 901 F.2d

(Continued on following page)

Stevens Creek falsely represents that the Court of Appeals disregarded pertinent interpretations of CERCLA by the Environmental Protection Agency ("EPA"). At oral argument before the Court of Appeals, counsel representing the United States as Amicus Curiae stated that the EPA had formulated no interpretation, official or otherwise, of Section 107(a) as it applies to the removal of asbestos from the structure of a commercial building. App. 23-24, n. 19. The EPA expressed no position on the central issue before the Ninth Circuit – Stevens Creek's ability to state a claim under Section 107(a) for removal of asbestos from a commercial building.

The Court of Appeals' decision is plainly correct, is in accord with all other courts and presents no issue of substance for this Court. Shorn of its plumage, Stevens Creek's petition merely restates arguments already rejected by all other federal courts.

A. The Disposal Requirement.

For Barclays to be liable under Section 107(a)(2)(B) Stevens Creek must establish a "release" or "threatened

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(Continued from previous page)

1550, reh. den., 911 F.2d 742 (11th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S.Ct. 752 (1991). The issue here, whether or not CERCLA provides a cause of action for asbestos removal from commercial buildings, was not even discussed in that case. One can only assume that the oblique reference to asbestos in the opinion relates to its disposal as waste rather than its use as a building material. *See, Smith Land and Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 87-88 (3rd Cir. 1988), *cert. den.*, 488 U.S. 1029, 109, S.Ct. 837, 102 L.Ed.2d 969 (1989); *United States v. Metate Asbestos Corp.*, 584 F.Supp. 1143, 1145 (D. Ariz. 1984).

release" of a hazardous substance, and that Barclays is a person "who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." The Ninth Circuit based its holding, in large part, on the fact that Barclays had not "disposed" of the asbestos within the meaning of the above cited section. Before reaching its conclusion that no disposal occurred, the Ninth Circuit reviewed the plain language of CERCLA beginning with its definition of terms. Section 101(29) defines disposal as having the same meaning as that attributed to disposal under the Solid Waste Disposal Act. The Solid Waste Disposal Act ("SWDA") defines disposal as solid waste or hazardous waste. 42 U.S.C. § 6903(3) and (5). The SWDA defines solid waste as "any garbage, refuse, sludge, . . . and other discarded material. . . . " 42 U.S.C. § 6903(27). The SWDA defines hazardous waste as a subset of solid waste. 42 U.S.C. § 6903(5). Regulations issued by the EPA define solid waste as "any discarded material" which is "abandoned, . . . recycled, . . . or inherently waste-like." 40 C.F.R. § 261.2(e)(1)(i). With these statutory definitions in mind the Ninth Circuit thus observed:

> "On its face 'disposal' pertains to 'solid waste or hazardous waste', not to building materials which are neither. There is no suggestion that Barclays or its predecessors in interest discarded asbestos insulation and fire retardants; rather they were used to construct the building." App. at 16.

The Ninth Circuit's interpretation of the disposal requirement as referring only to an affirmative act of

discarding a substance as waste, and not to the productive use of the substance, is in accord with all other federal courts which have construed the disposal requirement. *See Prudential Insurance Company of America v. United States Gypsum, supra,* 711 F.Supp. at 1253-56; *Jersey City Redevelopment Authority v. PPG Industries,* 655 F.Supp. 1257, 1260-61 (D.C.N.J. 1987), aff'd., 866 F.2d 1411 (3rd Cir. 1988); *Edward Hines Lumber Company v. Vulcan Materials Co.,* 685 F.Supp. 651, 654 (N.D. Ill. 1988), aff'd., 861 F.2d 155 (7th Cir. 1988); *United States v. Westinghouse Electric Corp.,* 22 Envt. Rep. Cas. (BNA) 1230 (S.D. Ind. 1983).[2]

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[2] Without regard to the disposal requirement, Stevens Creek's CERCLA claim also fails as a matter of law because there has been no release or threatened release of asbestos into the "environment." Section 101(8), 42 U.S.C. § 9601(8). Courts considering this language have concluded that the "environment" referred to does not include air within a building. The escape of asbestos fibers within a building thus falls outside the intended objectives of CERCLA. *See First United Methodist Church of Hyattsville v. United States Gypsum Co., supra,* 882 F.2d at 867 n.5; *Covalt v. Carey Canada, Inc.,* 860 F.2d 1434, 1436-1437 (7th Cir. 1988).

CONCLUSION

For the reasons set forth above, it is submitted that the petition for certiorari be denied.

DATED: April 18, 1991

Respectfully submitted,

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